LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.
No. 646

JOHN J. MOYLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

THOMAS J. GATELY,
112 West Seventh Street,
San Pedro, California,
Attorney for Petitioner.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Questions presented for review 2

Statutes involved 2

Statement of the case 3

Argument 7

I.

The decision below is in conflict with a decision of this court and a decision of the United States Court of Claims on the question of reasonable value 7

II.

The decision below is in conflict with established legal precedents in re the formation of a unilateral contract 9

III.

The decision below is in conflict with a decision of the Third Circuit and various federal district courts 10

Conclusion 11

Appendices:

Appendix "A." Judgment of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix "B." Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 2

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Blandy v. United States, 33 Fed. Supp. 752	10
Clark v. United States, 95 S. Ct. 539, 24 L. Ed. 518	7
Federal Crop Insurance v. Merrill, 332 U. S. 380	9
Gray v. Cheatham, 52 S. W. 2d 762	8
Pacific Maritime Ass'n v. United States, 123 Ct. Cl. 667, 108 Fed. Supp. 603	7
Smale and Robinson, Inc. v. United States, 123 Fed. Supp. 457	11
Southern Pacific Co. v. United States, 192 F. 2d 438	10

STATUTES

United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 41, Sec. 252	3, 10
United States Code, Title 46, Sec. 1127	2, 10

REGULATIONS

United States Maritime Board, General Order 70, Amdt. 2, Sec. 243.2	10

OTHER AUTHORITIES

2 American Jurisprudence, Sec. 311, p. 244	8
12 American Jurisprudence, Sec. 43, p. 537	9
58 American Jurisprudence, Sec. 10, p. 518	8
27 California Jurisprudence, Sec. 44, p. 238	8

IN THE

Supreme Court of the United States

October Term, 1957.

No. .....

JOHN J. MOYLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Your petitioner, John J. Moylan, plaintiff below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment rendered by the United States District Court for the Southern District of California, Central Division.

Opinions Below.

The Findings of Fact, Conclusions of Law [R. 11-14] and Judgment of the District Court [R. 14-15] are not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 57-60; Appx. A] has not yet appeared in the official reports. A timely petition for rehearing was denied by that Court [R. 62] on September 11, 1957.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on August 8, 1957 [R. 61; Appx. A]. The order denying the petition for rehearing is dated and was entered on September 11, 1957.

Questions Presented for Review.

First Question.

Whether or not the reasonable value for requested services rendered should be based on the agreed rate of compensation, or, in the absence of such an agreement, reasonable value should be determined by the cost to industry for like services in the same locality.

Second Question.

Whether or not a request to perform an act followed by performance of the requested act, forms a valid unilateral contract.

Third Question.

Whether or not the acts of a government agent when acting within the scope of his authority, works an estoppel against the government.

Statutes Involved.

46 U. S. C., Section 1127:

> (a) The Commission is hereby authorized and directed, through such administrative measures, agreements with other Federal departments and agencies, contracts with individuals or private business

concerns, or other arrangements, as it may deem to be necessary or appropriate in the public interest, to coordinate the functions and facilities of public and private agencies engaged in the forwarding and similar servicing of waterborne export and import foreign commerce of the United States, for the efficient prosecution of the war, the maintenance and development of present and post-war foreign trade, and the preservation of forwarding facilities and services for the post-war restoration of foreign commerce. * * *

41 U. S. C. Section 252:

(a) The provisions of this chapter shall be applicable to purchases and contracts for property and services made—

(1) By the General Service Administration for the use of such agency or otherwise. * * *

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts maybe negotiated by the agency head without advertising if—

(3) the aggregate amount involved does not exceed $1,000. * * *

(4) for personal or professional services.

Statement of the Case.

Appellant is a duly licensed freight forwarder engaged in business in the City of Los Angeles, State of California.

The Pacific Westbound Conference is an association of ocean carriers operating between the West Coast and the Orient.

General Services Administration is an administrative branch of the United States Government.

Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to freight forwarders. Consequently government agencies entered into contracts with licensed freight forwarders for the handling of government shipments. In June, 1950, appellant submitted a low bid of 6½ cents per ton or a minimum charge of $7.50 per shipment and was awarded a contract with General Services Administration. The main reason for appellant's low bid was to get his name on the list of approved forwarders and demonstrate the quality of his work to the government [R. 23]. This contract expired by its own terms on June 30, 1951.

In June, 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid a brokerage fee of 1¼% of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration offering to perform forwarding services at no charge to the government in view of the fact that he would receive the said brokerage payment from the carrier. On July 9, 1951, General Services Administration replied to appellant's letter and stated in substance that in view of the payment of said brokerage by the carrier to forwarders designated by the shipper no contract with the government was necessary, but the government would rotate their shipments among licensed forwarders.

With this common understanding of the parties hereto as to the payment of brokerage by the carrier designated by the shipper, the appellee on or about July 15, 1951, re-

quested appellant to act as its agent in performing forwarding services on appellee's shipments and continuously thereafter requested and used appellant's services as a forwarding agent until August, 1953. Appellant performed all services requested by appellee during this period and repeatedly demanded that appellee file with the said Conference a designation of the appellant as agent of the appellee. In lieu of filing the said designation appellee supplied appellant with various reasons as to why the designation could not be filed at that time, but promised that the matter would be straightened out. The main excuse of appellee for not filing said designation was the rule of said conference that appellant be designated as an agent who actually booked the cargo. Appellee insisted that it was the policy of the appellee to book its shipments and the appellee refused to either allow the appellant to book the cargo or credit the appellant with the booking. Due to this refusal of the appellee to file said designation the appellant was unable to collect earned brokerage fees in the amount of $8,543.72 from the member carriers.

Appellant submitted a claim to the appellee in the sum of $238.48 for postage expenses incurred in performing the said requested forwarding services on appellee's shipments. This claim was approved by the appellee and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation lost in the amount of $8,305.24 due to appellee's refusal to designate him as its agent. Appellee conceded that appellant had rendered valuable services to appellee and agreed to pay

appellant on a *quantum meruit* basis. As a basis for determining the reasonable value of appellant's services the appellee referred to the rates paid appellant under the prior expired contract and offered appellant the sum of $1,881.10 in full settlement of his claim. Appellant refused this offer on the ground that reasonable compensation should be based first on the agreed rate of compensation, to wit, 1¼% of the ocean freight charge, or in the absence of such an agreement reference should be made to the cost to industry for similar services in the Los Angeles area. Appellee refused to offer more than the original sum of $1,881.10. In August, 1954, appellee changed its procedure by tentatively booking the cargo in Washington and allowing the freight forwarder to confirm the booking. Under this new policy appellee filed a designation of appellant as its agent with the said Conference in September, 1954, and from that date on appellant has been paid brokerage by the member carriers on all shipments he forwarded for the appellee.

The District Court held in favor of defendant. Plaintiff appealed to the Court of Appeals which court affirmed the decision of the District Court and denied appellant's petition for a rehearing.

ARGUMENT.

I.

The Decision Below Is in Conflict With a Decision of This Court and a Decision of the United States Court of Claims on the Question of Reasonable Value.

In deciding the question of reasonable value for services rendered in the case of *Clark v. United States*, 95 S. Ct. 539, 24 L. Ed. 518, this court stated:

> "Value for the use of vessel per day, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract."

In *Pacific Maritime Association v. United States*, 123 Ct. Cl. 667, 108 F. Supp. 603, Judge Whitaker answering the question: "What is fair compensation?" stated:

> "No better answer to the question of what is fair compensation, than what the parties agreed upon, to wit, 1.7 cents per hour."

The court below in its opinion [R. 59; Appx. A] complained that the trial court should have been given some intelligent middle ground upon which to land. On this basis the court below affirmed the decision of the trial court in its selection of the lowest price available through the medium of competitive bidding in determining the reasonable value of services rendered. No middle ground was given by the plaintiff below due to the fact that there is no such basis available. Plaintiff below testified that the cost to industry for forwarding services in the Los Angeles area is 1¼% of the ocean freight charge, which testimony was not rebutted by the government [R. 40]

The court below also stated [R. 59; Appx. A]:

> "If there had been proof that there was during the period in question a uniform rate paid by shippers, not carriers, this court could explore whether the ruling below was clearly erroneous. But the reasonable value of services performed for a buyer is not always the same as when performed for a seller."

It is a matter of common knowledge that a carrier in establishing rates includes the cost of brokerage fees. The shipper pays a uniform rate whether or not he employs the services of a freight forwarder. The court below in affirming the decision of the trial court ignored the pronouncements of this court and the Court of Claims as set forth above.

The court below also ignored established legal precedents set forth in the case of *Gray v. Cheatham*, 52 S. W. 2d 762, 763, and the prevailing rule of law *in re* determination of reasonable value as set forth in 2 Am. Jur. 244, Sec. 311; 58 Am. Jur. 518, Sec. 10, and 27 Cal. Jur. 238, Sec. 44.

This court has never ruled on the correct basis for determining reasonable value in the absence of any evidence on the subject. It is vital to industry that this Court clearly enunciate the correct basis for such a determination. In the absence of such a ruling the basis in the 9th Circuit for determining reasonable value will be the lowest price available for similar services in the same locality.

II.

The Decision Below Is in Conflict With Established Legal Precedents in re the Formation of a Unilateral Contract.

American Jurisprudence sets forth a clear definition of the rule of formation of a contract by performance of an act:

> "In reference to the sufficiency of an acceptance, there is a distinction between an offer to make a contract executory on both sides and an offer of promise for an act. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed."
>
> 12 Am. Jur. 537, Sec. 43.

In its decision, the court below repudiated this established legal principle and justified its ruling by a vague reference to the inapposite case of *Federal Crop Insurance v. Merrill*, 332 U. S. 380. Exhibits 2 and 3 show a common understanding that the plaintiff below was to receive a definite rate of compensation for his services. Finding of Facts No. 4 [R. 12] shows the performance by the plaintiff of all requested acts, but the court below omitted to consider the question of performance of a requested act or ratification of these acts by the acceptance of benefits resulting therefrom.

III.

The Decision Below Is in Conflict With a Decision of the Third Circuit and Various Federal District Courts.

At the trial of this action the government raised the defense of lack of authority by the Director, Storage and Transportation Division of General Services Administration to bind the government by contract. The authority of General Services Administration to use the services of Private Freight Forwarders is found in 46 U. S. C., Sec. 1127 (56 Stat. 176), and United States Maritime Board, General Order 70 Amendment 2, Section 243.2 Regulations. 41 U. S. C., Section 252, authorizes the head of General Services Administration to negotiate contracts without advertising providing the aggregate amount does not exceed $1,000, or the contract is for personal or professional services. Although said Director has an affidavit in the record that he is not a contracting officer of the United States, there is a presumption in law that such Director performed his official duties and the authority to employ an agent was delegated to him. This presumption was not rebutted by the government.

In the case of *Southern Pacific v. United States*, 192 F. 2d 438, the court stated:

> "Where an army transportation officer had charge of shipping obsolete equipment he had incidental authority to contract for its transportation."

In the case of *Blandy v. United States*, 33 Fed. Supp. 752, the court held:

> "There is a presumption that an officer of a government agency was delegated for the duty he performed."

In its opinion the court below omitted to consider or discuss this presumption and the fact that the government had failed to overcome said presumption.

The court below also omitted to consider the question of estoppel where an agent of the government acts within the scope of his authority.

In the case of *Smale and Robinson, Inc. v. United States* (1954), 123 Fed. Supp. 457, District Judge Mathes states:

> "Acts or omissions of agents lawfully authorized to bind the United States, or *direct its course of conduct* during a particular transaction will work estoppel against the government if agents acted with the scope of their authority."

The court below based its ruling on the affidavit of the Director that he was not a contracting officer of the United States and refused to consider the questions of incidental authority, the presumption of delegation of authority or the question of estoppel as set forth in the above cited decisions.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS J. GATELY,

Attorney for Petitioner.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

John J. Moylan, Appellant vs. United States of America, Appellee. No. 15411.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: August 8, 1957. Paul P. O'Brien, Clerk.

APPENDIX "B."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John J. Moylan, Appellant vs. United States of America, Appellee. No. 15,411. Aug. 8, 1957.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before Chambers and Barnes, Circuit Judges; Walsh, District Judge.

CHAMBERS, Circuit Judge:

Moylan is a freight forwarder at Los Angeles. For a year prior to June 30, 1951, under a specific contract with the General Services Administration, the housekeeping organization of the United States government, he guided through the Port of Los Angeles and on to vessels outbound into the Pacific a considerable volume of government freight. It is fair to say that his contract price of six and one-half cents per ton plus a fee of $7.50 for each shipment was a modest one. Moylan says the reason he bid for and obtained the contract at these rates was that when he did he was a beginner and anxious to get started in the business.

In June, 1951, the West Coast carriers affiliated together under the name of Pacific Westbound Conference initiated the practice of paying freight forwarders such as Moylan a brokerage fee of one and one-fourth per cent of the shipping charges.[1] Obviously, General Services im-

---

[1] A prerequisite to the commission or fee was the filing by the shipper of a formal designation of the forwarder as the shipper's forwarder.

mediately was desirous of eliminating its brokerage fees to Moylan, but there were obstacles. The new rules of the Pacific Conference required that the selection of the carrier for each shipment be made by the freight forwarder. General Services took the position that it had to retain the right to select the carriers, that is, the booking.

In August, 1954, some manner of "initial booking" by General Services in Washington and "confirmation booking" by the freight forwarder was arranged that was acceptable to the Pacific conference. Thereupon, Moylan was formally designated by certificate filed with the conference by General Services as a freight forwarder for the government. And since 1954 Moylan has been receiving the pay for his services to General Services from the carriers—two steps removed from the taxpayers, rather than one.

But what of the interim? For two years and two months after June 30, 1951, with no express bilateral written contract with the government and without the certification required by the Pacific carriers Moylan acted as freight forwarder for General Services. During this time he pressed to have his status clarified. The pattern of the Pacific conference just did not mesh with the government's plan of doing business, and it took three years to remodel the Pacific conference's and the government's contract machinery.

For the two years, two months of uncompensated service if paid for at the rate listed under Moylan's expired contract, he would be entitled to $1,881.10. But if Moylan could have been paid the one and one-fourth per cent by the carriers his compensation would have been $8,305.24. Eventually, Moylan filed his claim with the government for this $8,305.24. The General Accounting

Office allowed only $1,881.10 and tendered a treasury check for that amount which Moylan received but has not yet cashed, being unhappy with the settlement. Following receipt of this, to him, inadequate check, Moylan sued in the United States District Court at Los Angeles for the sum of $8,305, being 24 cents less than the amount he could have been paid by the carriers had he been certified all along. It may be assumed that *sub silentio* Moylan proposed to return the check for $1,881.10.

The government's position in the accounting office and at the trial was that Moylan did perform services at the request of the government for which he should be paid the reasonable value, but no more than at the expired contract rate, to wit: $1,881.10, the sum already tendered. This position the trial court sustained. The judgment contemplates that Maylan may cash the check which he already has, but no more.

In his complaint and at th trial, in addition to his *quantum meruit* claim, Moylan sought to establish an express contract. One theory was that of unilateral contract: The government by accepting Moylan's performance had made a contract. The trial court found there was no contract during the period in suit. After examining the record, including the exhibits, this court agrees.

At no time after June 30, 1951, did Moylan agree that the old contract rate was acceptable. He was steadily pressing for the certification to the Pacific conference so that he could collect his one and one-fourth per cent, not from the government but from the carriers. It could not be said that by any means he consented to a continuance of his old cut-rate arrangement. But he kept on performing the forwarding service on the outbound Pacific freight of General Services. If one could find an express contract

here, there still is the insuperable block that there is no showing of a contracting act by an authorized contracting officer. There is ust too much herein of Federal Crop Insurance v. Merrill, 332 U. S. 380, to permit a recovery on express contract or upon some sort of an estoppel.

Appellant also complains of the *quantum meruit* finding that $1,881.10, already tendered, was the reasonable value of the services. Certainly the award cannot be called generous. However, Moylan's last contract rate was admissible as evidence of the reasonable value of his services. It may be assumed that the percentage rate paid by the carriers after they commenced to absorb the compensation for forwarders was also competent evidence to receive. There is every indication in the record that if the trial court had been given some intelligent middle ground upon which to land, that such would have been done. But the court was given no such opportunity. If there had been proof that there was during the period in question a uniform rate paid by shippers, not carriers, this court could explore whether the ruling below was clearly erroneous. But the reasonable value of services performed for a buyer is not always the same as when performed for a seller. Generally, when the seller pays there is an element of "you got us the business" to be paid for. That would be true here where the forwarders on private shipments probably were free to select the carrier. Apparently, only on the government shipments was there a formal restriction on selection of a carrier.

Here there was a justifiable reason for the trial court to reject the higher figure. Then under the evidence the court had little choice except to take the low figure. Not too much may be required for a trier of facts to come up with an intermediate figure, but it should have some foundation.

General Services Administration seems to have been unduly ponderous in handling its business with Moylan. But on its side it can be said that the new mode of the Pacific carrier's conference adopted in 1951, whereunder the carriers undertook to pay the forwarder, was not tailor-made for government shipments. Adjustments had to be made before it was usable. To have immediately accepted and certified Moylan, giving Moylan control over bookings, if such could have been done, might have provoked on honorable men criticism of favoritism.

The judgment is affirmed.[2]

(Endorsed:) Opinion. Filed Aug. 8, 1957.

Paul P. O'Brien, Clerk.

[2] Appellee suggests here that perhaps this is a case in which the government has not consented to be sued. Then it is cavalierly said that since the judgment gave Moylan nothing he did not have already, and the judgment (it says) is correct if the government has consented to be sued; therefore, it will not press this possible defect. If such defect exists it should be disclosed—even now.